In The Supreme Court of The United States

OCTOBER TERM, 1955

No. 336

CHARLES STACEY and WILLIAM WINSLOW,
Appellants,

vs.

THEODORE PAPPAS,
Appellee.

BRIEF OF APPELLANTS

Opposing Motion
To Dismiss Appeal

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ARGUMENT

I

The decision of the high court of Maine—that effective peaceful picketing of workers at their place of employment, although directed at the proper objective of having non-union employees become members of a union, is nevertheless an unlawful, because coercive, means to achieve such objective—raises an important and substantial issue relating to the constitutional guarantee of free speech.

We direct attention to appellee's claim that the Supreme Judicial Court of Maine has created no federal question of substance by its decision that peaceful picketing, conducted by appellants at appellee's place of business and directed at non-union employees of appellee for the purpose of having them join appellants' union, constitutes unlawful coercion of such employees.

Appellee's claim is made in spite of his concession that

> "picketing is in part an exercise of the right of free speech guaranteed by the Federal Constitution". (*Motion To Dismiss*, p. 5).

Since any state violation of so "jealously guarded" a constitutional guarantee as free speech would normally precipitate a federal question of substance, the burden lies upon appellee to indicate the existence of special circumstances which render the present issue unworthy of this court's attention.

In an attempt to sustain this burden, appellee points to the single factor that the peaceful picketing has been effective, in that it has induced the public to withhold patronage and services from appellee's business. (*Motion To Dismiss*, p. 7; *Jurisdictional Statement*, Appendix A, p. 25). Appellee maintains that it is this economic injury to his business caused by the public's response to the picketing and its indirect impact on his employees which, consistently with the Fourteenth Amendment, may be fastened upon by the State of Maine as the "component" transforming the peaceful picketing into a "coercive" and, therefore, illegal instrumentality. Apparently, it is appellee's further position that these conclusions find sufficient sanction in doctrine previously promulgated by this court to require no new consideration of the issues raised.

Appellee's argument is entirely without merit. Prior decisions of this court, and the rationale underlying the decisions, afford overwhelming portent that the Maine court has done violence to the Fourteenth Amendment of the United States Constitution.

In *Thornhill* vs. *Alabama,* 310 U. S. 88 (1940) this court ruled:

> "It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests". (p. 104).

In *Carlson* vs. *California,* 310 U. S. 106 (1940), the precise factor relied upon by the Maine court as the special basis to avoid constitutional transgression in holding peaceful picketing coercive and therefore illegal—damage caused to a business by loss of patronage and the services of suppliers—was explicitly considered and rejected.

Finally, the two decisions of this court from which the appellee quotes general language, *Building Service Employees International Union* vs. *Gazzam,* 339 U. S. 532, and *Giboney* vs. *Empire Storage and Ice Company,* 336 U. S. 490, provide no support for appellee's claims. There is no intimation in *Giboney,* either in decision or language, that peaceful picketing may be deemed to be an unlawful instrumentality when, and by virtue of the fact that, it inflicts economic damage upon the persons at whom it is directed.

It would seem that the *Gazzam* case may be regarded as one of the more recent cases indicating the error, rather than the soundness, of appellee's argument. In *Gazzam,* this court took pains to state explicitly that the various matters here under

discussion were excluded from that decision. In the instant case, the Maine court has construed and applied a Maine statute to outlaw, as interference restraint or coercion, peaceful picketing by workers of other non-union workers; the *Gazzam* opinion noted that the Washington statute had no such effect and that it had

> "not been construed by the Washington court to prohibit picketing of workers by other workers". (p. 539).

Here, the Maine court, and the appellee, are contending that the peaceful picketing, because it damages the business on which the employees depend for their livelihood and thereby clamps them in an "economic vise" (*Motion To Dismiss,* p. 7) is, *in itself,* "coercion and restraint" of the employees, outlawed by the Maine statute. In *Gazzam,* however, this court was scrupulously careful to mention that no contention was being asserted that peaceful picketing, *per se,* is constitutionally enjoinable as a form of coercion.

Thus, the import of the decisions and reasoning of this court on the subject of peaceful picketing is that it is unconstitutional to treat peaceful picketing (directed at employees to achieve organization) as an instrumentality which is coercive and impairs the free choice of employees, solely by virtue of the fact that the picketing induces the public to withhold patronage or services from the business on which the employees depend for their livelihood. Regardless of the outcome of the matter on the merits, however, surely the least that can be said is that a serious question of constitutionality appears.

Manifestly, the magnitude of the constitutional question cannot be diminished by quoting, as does appellee, general language removed from the context of the decisions in *Giboney* and *Gazzam.* Such language suggests only that peaceful picketing, found to be an abuse of the right to picket because aimed at accomplishing a violation of an important state policy, may be constitutionally enjoined. It has no relevance to the position here asserted by appellee and the Maine court, that peaceful picketing, although directed to an

entirely lawful objective—increasing union membership—is, nevertheless an unlawful means of accomplishing that end when, and because, it causes economic damage to the non-union employees sought to be reached.

The constitutional issue engendered is fraught with far-reaching consequences. If the Maine court is correct, and if peaceful picketing, whenever it causes economic damage, may be outlawed as an illegal means—because coercive—to achieve an otherwise valid objective, constitutional history in the United States is being remade. More particularly, there is involved a recasting of the mold of decision and reasoning on the subject of peaceful picketing which has been formed during two decades since peaceful picketing was first enveloped within the protective cloak of the Fourteenth Amendment. Surely, such consequences, if they are to be sanctioned at all, should emerge only from the deliberate consideration and decision of this court; they should not result from aloofness, or default, on the part of the supreme constitutional authority of the land. On the other hand, if the Maine court has violated the Fourteenth Amendment, its decision cannot be left undisturbed. The error is a major one and, unless corrected by this court, can lead to widespread restraint of free expression in labor disputes throughout the country.

A substantial federal issue is presented.

II

The decision of the Maine court—that effective peaceful picketing directed at non-union employees at their place of employment to induce them to join the picketers' union, is the necessary legal equivalent of peaceful picketing which is calculated to accomplish the unlawful objective of employer coercion of employees—raises a substantial and important constitutional issue.

Because of the fact alone that effective peaceful picketing by union workers at an employer's premises, aimed at non-union employees to have them join the picketers' union, im-

poses economic damage on the employer, thereby creating the potential that the employer will interfere with his employees in their free choice of bargaining representative, the Maine court, as a matter of law, has equated such peaceful picketing with picketing designed to achieve illegal employer coercion of employees.

In his motion to dismiss this appeal, appellee contends that such decision by the Maine court creates no substantial federal issue. Appellee so argues, (1) in spite of his recognition that peaceful picketing is a manifestation of speech, the free exercise of which is constitutionally guaranteed by the Fourteenth Amendment; and (2) in disregard of the fact, as shown in appellee's Jurisdictional Statement (pp. 13-16), that this court has never sustained an injunction against peaceful picketing because of an alleged improper objective, unless evidence, additional to the item alone of conduct reasonably to be expected as a means of avoiding economic loss, is adduced to establish the improper objective as the *calculated design* of the picketers.

Appellee has not undertaken to support his claim by disputing the accuracy of appellants' analysis of the decisions and reasoning of this court. All that appellee offers is a general statement that

> "it is basic in the many decisions of this court . . . that picketing *can in fact* be designed to cause coercion, interference and restraint upon the decisions and actions of men in violation of law . . . " (*Motion To Dismiss*, pp. 5-6). (Italics ours).

While the truth of this proposition may be conceded, it is obviously irrelevant in the present instance. Here, the crux of the dispute is the deliberate undertaking by the Maine court precisely to dispense with the need for *facts* proving purpose and to establish a necessary equivalence, as a *matter of law*, between any and all "organizational" picketing by union workers of non-union workers at the place of employment and picketing which is calculated to accomplish the unlawful objective of having the employer coerce his employees into joining a union.

That the assertion of such equivalence as a general proposition of law will pose serious constitutional difficulties seems the obvious warning of this court in *Gazzam,* when the court says:

> "there is no contention that picketing directed at employees for organization purposes would be violative of that policy", (pp. 539 and 540).

namely, the policy against coercion, by employers, of workers in their choice of bargaining representative. If no substantial constitutional questions might be deemed to arise from posturing, as does the Maine court, a legal identification between

> "picketing directed at employees for organization purposes"

and picketing calculated to achieve unlawful

> "coercion by the employer of the employees' selection of a bargaining representative",

why was this court so concerned in *Gazzam* to emphasize a distinction of substance and to highlight the fact that the Washington court had promulgated no such equivalence?

The importance of the distinction thus preserved in *Gazzam* and the serious constitutional consequences of obliterating it, as the Maine court has done, are sharply focussed in a recent Missouri decision. In *Bellerive Country Club* vs. *Henry McVey et al,* ..... Mo. ....., 28 C. C. H. Labor Cases, ¶69,278 at p. 89,205 (June 13, 1955) the Missouri court crystalizes the essence of the problem in the following language:

> "The parties agree, and we have held, that peaceful picketing may be enjoined if one of its objectives or purposes is unlawful. [Citation]. The difficulty is that it appears to us that 'organizational' or 'advertising' picketing usually, if not always, has the effect, to some extent, of tending to cause the employer, in order that he may avoid the hardship, loss and inconvenience imposed upon him as the comparatively innocent middleman, to be tempted to persuade his non-union employees to join a union. And where, as in the instant case, the evidence is such as to compel the inference that the picketing union knew or should have known that one effect of the picketing would, as it did, cause an increase in the cost of the club's operation, and would, as it did, result in the club's

inefficient and inconvenient operation, it reasonably may be said that in one sense one of the objectives or purposes of the picketing was to coerce the employer to violate the employees' constitutionally guaranteed right of free and uncoerced choice 'to organize and to bargain collectively through representatives of their own choosing' and thereby was an unlawful objective.

We think, however, that the total problem involved is not so simple of solution. Surely, such an inflexible application of the meaning of Article I, Section 29, Missouri Constitution, 1945, as above suggested, would, in some circumstances, effectively and unconstitutionally deny the right of free speech involved in the right of peaceful picketing. And while we appreciate the fact that picketing is not necessarily the legal equivalent of free speech (*Hughes et al vs. Superior Court of California*, 339 U. S. 460, 465; *International Brotherhood of Teamsters* vs. *Hanke et al*, 339 U. S. 470, 474) and that peaceful picketing under certain circumstances may be enjoined without violating the constitutional guarantee of free speech (*Giboney* vs. *Empire Storage and Ice Co.*, 336 U. S. 490, 93 L. Ed. 834, 69 S. Ct. 684) still the free speech involved as an element of communication in peaceful picketing may not be denied solely because an effect of certain, otherwise permissible, picketing, may be to tend to bring about a violation of a provision of our state constitution.

. . . It would appear, therefore, that a proper interpretation and application of Article I, Section 29, Missouri Constitution, 1945, and the solution of this case calls for a distinction between a 'purpose' or an 'objective' of picketing and the 'effect' of the picketing conducted for a lawful 'purpose'. That is to say that solely because the 'effect' of the picketing in the instant case may have had a *tendency* to cause the employer to violate his employees' constitutional right of free and uncoerced choice, it does not inevitably follow that one of the 'objectives' or 'purposes' of the picketing was unlawful." (p. 89,212).

As we have argued in detail in our Jurisdictional Statement, the various decisions of this court regarding peaceful picketing for an improper objective strongly indicate the correctness of the Missouri court's emphasis on the distinction between "purpose" and "effect" and the need for special evidence, additional to the fact alone of economic loss or its potential consequences, to establish purpose *as a matter of fact*.

It is of the utmost importance in the day to day conduct of labor-management relations and in the administration of labor law that the contrary approach of the Maine court be evaluated, as to its constitutionality, by this court. What is at stake here is nothing less than the very life of the conception that picketing is the working-man's traditional method of speech in labor disputes—the free exercise of which is guaranteed against state infringement by the Fourteenth Amendment. If the attitude of the Maine court is constitutionally sound and a valid precedent to be followed by other state courts, there will be a general tendency throughout the country to outlaw peaceful picketing in any context in which it causes, or has a tendency to impose, economic loss upon those at whom it is directed. The theory would be that any person caught in the "economic vise" (*Motion To Dismiss*, p. 7) which is the natural effect of peaceful picketing at a place of business is being "coerced". On this reasoning, accompanied by the technique of identifying "effect" with "purpose", all peaceful picketing which *causes* economic damage will be regarded as picketing for the *purpose* of accomplishing coercion and intimidation. The scope of such a conclusion, if tolerated, is indicated by the reminder of this court in *Carlson* vs. *California*, 310 U. S. 106 (1940) that

> "such a purpose [damage to the business by loss of patronage or service of suppliers] could be found in the case of nearly every person engaged in publicising the facts in a labor dispute; every employee or member of a union who engaged in such activity at the vicinity of a place of business could be found desirous of accomplishing such objective." (p. 112).

Hence, in almost every labor dispute the scene of which is a place of business, peaceful picketing as a method of publicity in such dispute could be effectively outlawed. Having *caused* "coercion", in the form of economic damage, the peaceful picketing could be said to be *designed to achieve* coercion—if there is, as appellee cavalierly insists, no

> "difference between picketing designed to cause coercion and picketing which . . . causes coercion." (*Motion To Dismiss*, p. 6).

If this be true, the concept that there is meaningful protection in the Fourteenth Amendment for peaceful picketing, conducted as a method of communication in the vicinity of a place of business during the course of a labor dispute, has been eroded to the point of extinction. The potential effects of such a conclusion on labor-management relations in general, and upon the methods of concerted activity traditionally employed in labor disputes throughout the United States, render the matters involved worthy of this court's attention. The United States Supreme Court is called upon to speak on the issues, either

(1) to affirm the decision of the Maine court, and the corollary implicit in it, that, for all practical purposes, the relationship between peaceful picketing and the Fourteenth Amendment is extinguished, or

(2) to declare the constitutional error of the Maine court and thereby proclaim the continuing vitality of the doctrine that peaceful picketing, as the working-man's method of communication, finds significant protection in the Constitution of the United States.

CONCLUSION

Substantial constitutional issues of public importance are here presented and require the consideration and decision of the Supreme Court of the United States.

Respectfully submitted,

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